FILED
AUG 5 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1765

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BANKERS LIFE AND CASUALTY COMPANY,
Appellant,

v.

LLOYD M. CRENSHAW,
Appellee.

On Appeal from the Supreme Court of Mississippi

BRIEF OF APPELLEE

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	6
ARGUMENT	8
I. SECTION 11-3-23 RATIONALLY PROMOTES SEVERAL LEGITIMATE GOVERNMENTAL INTERESTS IN A NONDISCRIMINATORY MANNER AND DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT	8
A. Because Section 11-3-23, As Applied, Does Not Involve A Suspect Classification, Does Not Impinge On A Fundamental Right, And Does Not Prevent Access To The Courts, It Should Be Reviewed Under The Traditional Rational Basis Test	10
B. Because Mississippi's Interests Are Legitimate, And Section 11-3-23 Rationally Furthers Those Interests, The Statute Is Constitutional	12
II. APPELLANT'S FEDERAL CONSTITUTIONAL CHALLENGES TO THE SIZE OF THE PUNITIVE DAMAGE AWARD WERE NEVER PRESENTED BELOW, AND SHOULD NOT BE CONSIDERED NOW	20
A. Neither Of The Grounds Relied Upon By Appellant To Challenge The Size Of The Punitive Damage Award Was Raised Below	22
1. The Excessive Fines Clause argument was not presented to the court below at any stage, and it is not a mere "enlargement" of arguments that were presented below	22

TABLE OF CONTENTS—Continued

Page

2. Appellent did not expressly challenge the size of the punitive damage award on federal Due Process grounds on appeal, in its petition for rehearing, or even in its brief in support of its petition for rehearing 24

B. The Court Should Not Consider A Constitutional Rule Limiting Punitive Damage Awards To The Maximum Monetary Punishment Authorized By The Legislature For Analogous Conduct Because Legislative Bodies Are Actively Considering Legislation That Would Make It Unnecessary To Resolve That Constitutional Question 26

III. THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT DOES NOT APPLY TO *ANY* CIVIL PROCEEDINGS, AND SHOULD NOT BE CONSTRUED TO RESTRICT PUNITIVE DAMAGE AWARDS TO THE MONETARY PUNISHMENTS FIXED BY STATUTE FOR ANALOGOUS CRIMINAL CONDUCT 27

A. The Eighth Amendment Does Not Apply To *Any* Civil Proceedings 27

B. There Is No Evidence That The Framers Of The Eighth Amendment Intended The Excessive Fines Clause To Limit The Size Of Punitive Damages Awarded To Private Plaintiffs In Civil Tort Litigation 30

C. Appellant's Proposed Standard For Determining Whether A Punitive Damage Award Is Excessive Within The Meaning Of The Excessive Fines Clause Would Destroy the Social Utility of Such Awards, Is Not Supported By History, And Would Be Completely Unworkable 36

TABLE OF CONTENTS—Continued

Page

1. Under Magna Carta and the English Bill of Rights, excessiveness was not measured by reference to legislatively fixed monetary punishments 37

2. Appellant's test for measuring excessiveness would be completely unworkable, and would require courts to make substantive and policy judgments they are ill-equipped to make 41

IV. APPELLANT'S CONTRACT CLAUSE AND DUE PROCESS OBJECTIONS TO THE AWARD OF ANY PUNITIVE DAMAGES IN THIS CASE SHOULD BE REJECTED.... 44

A. The Contract Clause Issue Is Not Properly Before The Court, And Has No Merit..... 44

B. The "Change of Law" Due Process Clause Issue Is Not Properly Before The Court, And Has No Merit 45

CONCLUSION 47

APPENDIX 1a

TABLE OF AUTHORITIES

CASES: Page

Addington v. Texas, 441 US 418 (1979) 19
Allen v. McCurry, 449 US 90 (1980) 15, 16
American Surety Co. v. Baldwin, 287 US 156 (1932) 45
Ashwander v. Tennessee Valley Authority, 297 US 288 (1936) 45
Bailey v. Anderson, 326 US 203 (1945) 22
Baldwin v. Iowa State Traveling Men's Association, 283 US 522 (1931) 15
Beck v. Washington, 369 US 541 (1962) 25
Benson v. Bart, 3 Burr. 1846, 97 Eng. Rep. 1130 (1766) 34
Bowe v. Scott, 233 US 658 (1914) 25
Broadrick v. Oklahoma, 413 US 601 (1973) 11
Brooks v. Wooton, 355 F.2d 177 (2d Cir. 1966) 42
Burlington Northern Ry. Co. v. Woods, —— US ——, 94 L.Ed.2d 1 (1987) 18
California Bankers Ass'n v. Shultz, 416 US 21 (1974) 29
Cardinale v. Louisiana, 394 US 437 (1969) 22
Chandler v. Florida, 449 US 560 (1981) 19
City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249 (1985) 10
Clements v. Fashing, 457 US 957 (1982) 17
Cohen v. Beneficial Industrial Loan Corp., 337 US 541 (1948) 17
Comfort v. Landrum, 52 So.2d 658 (Miss. 1951) 26
Commission v. Sunnen, 333 US 591 (1948) 15, 16
Dandridge v. Williams, 397 US 471 (1970) 14, 17
Daugherty v. Firestone Tire & Rubber Co., 85 F.R.D. 693 (N.D. Ga. 1980) 21
Day v. Woodworth, 54 US (13 How. 363 (1851)) 37, 39
De Backer v. Brainard, 396 US 28 (1969) 21
Dewey v. Des Moines, 173 US 193 (1899) ..... *passim*
District of Columbia Court of Appeals v. Feldman, 460 US 462 (1983) 22
Eagle Lumber & Supply Co. v. Robertson, 161 Miss. 17, 135 So. 499 (1931) 9
Earl of Devon's Case, 11 State Tr. 1354 (1689) 39, 40

TABLE OF AUTHORITIES—Continued

	Page
Educational Placement Services v. Wilson, 487 So.2d 1316 (Miss. 1986)	26
Eilenbecker v. District Court, 134 US 31 (1890)	29
Estes v. Memphis & C. Ry. Co., 119 So. 199 (Miss. 1928)	26
Federal Energy Regulatory Comm'n v. Mississippi, 456 US 742 (1982)	19
First National Bank of Boston v. Bellotti, 435 US 765 (1977)	30
Forbes v. State Council, 216 US 396 (1910)	45
Grey v. Grant, 2 Wils. K.B. 252, 95 Eng. Rep. 794 (1764)	34
Griffin v. Illinois, 351 US 12 (1956)	12
Hanson v. Denckla, 357 US 235 (1958)	45
Hart v. Catoe, 393 So. 2d 1346 (Miss. 1981)	9
Hart-Anderson v. Hauck, Civ. No. 85-498 (Mont. March 17, 1987)	21
Hart Steel Co. v. Railroad Supply Co., 244 US 294 (1917)	15
Hathorn v. Lovorn, 457 US 255 (1982)	45
Herman & MacLean v. Huddleston, 459 US 375 (1983)	25
Herndon v. Georgia, 295 US 441 (1935)	45
Hogan v. Cunningham, 172 So.2d 408 (Miss. 1965)	26
Huckle v. Money, 95 Eng. Rep. 768 (1763)	33
Illinois Cent. R. Co. v. George, 241 Miss. 233, 130 So. 2d 260 (1961)	13
Illinois v. Gates, 459 US 1028 (1982)	45
Ingraham v. Wright, 430 US 651 (1977)	27, 28
Jones v. Barnes, 463 US 745 (1983)	12
Koway Enterprises, Inc. v. Pennsylvania Public Utility Commission, 85 Pa. Comm. 1, 480 A.2d 1317 (1984)	29
Lindsey v. Normet, 405 US 56 (1972)	*passim*
Live Oak Ass'n v. Railroad Commission, 269 US 354 (1926)	25
Lynch v. New York ex rel. Pierson, 293 US 52 (1934)	25

TABLE OF AUTHORITIES—Continued

Page

Marek v. Chesney, 87 L.Ed.2d 1 (1985) 18, 19
Martinez v. State of California, 444 US 277 (1977) 37
Massachusetts Bd. of Retirement v. Murgia, 427 US 307 (1976) 14, 17
McGoldrick v. Compagnie Generale, 309 US 430 (1940) 22
McGowan v. Maryland, 366 US 420 (1961) 11
McKane v. Durston, 153 US 684 (1894) 12
Mishkin v. New York, 383 US 502 (1966) ..... *passim*
Mississippi State Highway Commission v. Rives, 271 So.2d 725 (Miss. 1973) 26
Montana v. United States, 440 US 147 (1979) 15
National Union of Marine Cooks and Stewards v. Arnold, 348 US 37 (1954) 12
Nevada v. United States, 463 US 110 (1983) 16
New State Ice Co. v. Liebmann, 285 US 262 (1932) 19
New York City Transit Authority v. Beazer, 440 US 568 (1979) 17
New York ex rel. Bryant v. Zimmerman, 278 US 63 (1928) 25
Ohio Bureau of Employment Services v. Hodory, 431 US 471 (1977) 14
Ortwein v. Schwab, 410 US 656 (1973) ..... *passim*
Palmer v. A.H. Robins, 684 P.2d 187, 217 (1984) 21
Pennzoil Co. v. Texaco, Inc., —— U.S. ——, 95 L.Ed.2d 1 (1987) 18
Pervear v. Massachusetts, 5 Wall. 475 (US 1867) 29
Phillips Chemical Co. v. Dumas School Dist., 361 US 376 (1960) 17
Pilot Life Insurance Co. v. Dedeaux, 481 US ——, 95 L.Ed.2d 39 (1987) 47
Radio Station WOW, Inc. v. Johnson, 326 US 120 (1945) 45
Reed v. Allen, 286 US 191 (1932) 15
Reeves, Inc. v. State, 447 U.S. 429 (1980) 19
Ross v. Moffitt, 417 US 600 (1974) 12

TABLE OF AUTHORITIES—Continued

	Page
Schweiker v. Wilson, 450 US 221 (1981)	11, 17
Sedima v. Imrex, 473 US 479 (1985)	*passim*
Shipman v. Lovelace, 215 Miss. 141, 60 So. 2d 559 (1952)	13
Silkwood v. Kerr-McGee Corp., 464 US 238 (1984)	36, 37
Solem v. Helm, 463 US 277 (1983)	36
South Central Bell v. Epps, Civ. No. 55870 (Miss. Sup. Ct., June 3, 1987)	47
Southern Pacific R. Co. v. United States, 168 US 1 (1897)	16
State v. Cabana Terrace, Inc., 153 So.2d 257 (Miss. 1963)	26
Stembridge v. Georgia, 343 US 541 (1952)	25
Street v. New York, 394 US 576 (1969)	22
Superintendent v. Hill, 472 US 445 (1985)	45
Tacon v. Arizona, 410 US 351 (1973)	22
Tidal Oil Co. v. Flanagan, 263 US 444 (1923)	8, 44
Trainor v. Hernandez, 431 US 434 (1977)	18
Trop v. Dulles, 356 US 86 (1958)	28
Tull v. United States, —— US ——, 107 S. Ct. 1831 (1987)	37
United States v. Kras, 409 U.S. 434 (1973)	9, 10
United States v. Morton Salt Co., 338 US 632 (1950)	29, 30
United States v. Raines, 362 US 17 (1960)	11
United States v. United Mine Workers of America, 330 US 258 (1947)	36
United States Railroad Retirement Bd. v. Fritz, 449 US 166 (1980)	17
University of Tennessee v. Elliot, 478 US ——, 92 L.Ed.2d 635 (1986)	15, 16
Uphaus v. Wyman, 360 US 72 (1959)	28
Vance v. Bradley, 440 US 93 (1979)	*passim*
Walters v. Inexco Oil Co., 440 So.2d 268 (Miss. 1983)	*passim*
Webb v. Webb, 451 US 493 (1981)	22, 25
Whitney v. California, 274 US 357 (1927)	22
Williamson v. Lee Optical Co., 348 US 483 (1955)	17

TABLE OF AUTHORITIES—Continued

	Page
Wilson v. Cook, 327 US 474 (1946)	22
Younger v. Harris, 401 US 37 (1971)	18
STATUTES AND REGULATIONS:	
18 U.S.C. §§ 1963, 1964(c)	29
28 U.S.C. § 2103	13
Fed. R. Civ. P. 68	18
Ala Code § 12-22-72 (1986)	19
Ariz. Rev. Stat. Ann. § 12-2106	13
Ga. Code Ann. § 5-6-6	13
Ky. Rev. Stat. § 26A.300 (1985)	19
Me. Rev. Stat. Ann. tit. 14, § 1802	13
Mich. Gen. Ct. Rule 816.5	13
Mich. Gen. Ct. Rule 861.5	13
Mississippi Constitution, Art. 3, sec. 14	25
Miss. Code Ann. Sec. 11-3-23 (Supp. 1986)	*passim*
Miss. Code Ann. Sec. 83-5-39	42
Miss. Code Ann. Sec. 83-5-41	42
Miss. Code Ann. Sec. 83-5-49	42
Miss. Code Ann. Sec. 85-5-35	42
Miss. Code Ann. Sec. 97-23-25	41
N.H. Rev. Stat. Ann. § 490.14-a	13
Or. Rev. Stat. § 19.160	14
Pa. R. App. P. 2744	14
Va. Code § 16-1-113 (Supp. 1986)	19
Wisc. R. Civ. P. 809.25(3)	14
Wisc. R. Civ. P. 809.83(1)	14
PUBLICATIONS:	
W. Blackstone, COMMENTARIES ON THE LAW OF ENGLAND (1768)	*passim*
Comment, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. CHI. L. REV. 408 (1967)	42, 43
W. Hale, HANDBOOK OF THE LAW OF DAMAGES (2d ed. 1912)	*passim*
R. Lynn, APPELLATE LITIGATION (1985)	13
McKechnie, MAGNA CARTA 287 (2d ed. 1958)	*passim*

TABLE OF AUTHORITIES—Continued

Page

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Smith, A CONSTITUTIONAL AND LEGAL HISTORY OF ENGLAND (1955) 32
Stern, Gressman & Shapiro, SUPREME COURT PRACTICE (6th ed. 1986) 25
16 C. Wright & A. Miller, FEDERAL PRACTICE & PROCEDURE (1969) 21
18 C. Wright & A. Miller, FEDERAL PRACTICE & PROCEDURE (1981) 15

OTHER:

S. Ct. R. 34.1(j) 41
S. Ct. R. 50 13
Magna Carta ..... *passim*
English Bill of Rights ..... *passim*
Senate Report 98-476, 98th Cong., 2d Sess., on S.44 26
Tort Litigation Reform Act of 1987, S.554 26

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BANKERS LIFE AND CASUALTY COMPANY,

Appellant,

v.

LLOYD M. CRENSHAW,

Appellee.

On Appeal from the Supreme Court of Mississippi

BRIEF OF APPELLEE

STATEMENT OF THE CASE

For several years, Appellee Lloyd Crenshaw paid premiums to Appellant Bankers Life and Casualty Company to purchase insurance coverage against accidental dismemberment. Appellee suffered an accidental injury to his right foot. Twelve days after that injury his foot had to be amputated. Appellee submitted a claim for the policy benefit of $20,000. Appellant repeatedly denied the claim. Appellee sued for his policy benefit and also for punitive damages for the tort of bad faith refusal to pay an insurance claim.

A jury awarded the $20,000 owed under the policy and also punitive damages of $1.6 million. That judgment was affirmed by the Mississippi Supreme Court, which concluded that Appellant's refusal to pay the claim was "an outrage, and should be condemned." Jurisdictional Statement Appendix ("J.S. App.") 47a; 483 So.2d at 276. Because the judgment was affirmed without modification, a penalty of $243,000 (15% of the judgment) was assessed against Appellant pursuant to Miss. Code Ann. Sec. 11-3-23 (Supp. 1986) (reprinted in the Appendix to this Brief).

In this Court, Appellant challenges the punitive damage award and, more briefly, the penalty. Appellant's arguments seriously mischaracterize the facts, the record, and the law. For example, Appellant repeatedly asserts that its refusal to pay Appellee's insurance claim for accidental injury benefits was "based upon the professional judgment" of its medical director that arteriosclerosis was the "sole" cause of Appellee's amputation, but the jurors nevertheless awarded punitive damages because they thought that opinion was "incorrect." Appellant's Brief ("App. Br.") 33.[1] This assertion ignores the jury instructions and the evidence.

Under instructions proposed by Appellant, the jury was instructed *not* to award punitive damages if Appellant relied on a reasonable, though incorrect, medical opinion.[2] The evidence plainly supports the jury's conclusion that Appellant's denial of coverage was not based on that opinion. An internal memo prepared subsequent to that opinion explicitly acknowledged that Appellant *did not know* "if an injury caused the loss," and *could*

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[1] *See also,* App. Br. 4, 6 & 42: ". . . Appellant has been punished in the sum of $1,600,000 for its reliance on its expert medical director to deny appellee's debatable claim."

[2] Record on Appeal to Mississippi Supreme Court ("R.") 1141, Joint Appendix ("J.A.") 21; R. 1142, J.A. 22.

not know until it obtained more information (which Appellant never bothered to obtain).[3]

The jury awarded punitive damages because Appellant knowingly misrepresented its contractual obligations to Appellee and denied coverage based on a policy provision it *knew* was legally invalid.

The Mississippi Supreme Court found that "Bankers Life denied [Appellee's] claim, and gave as a reason therefore an exclusion under the policy which its executive personnel knew was invalid under Mississippi law." J.S. App. 33a-34a; 483 So.2d at 270. The policy language excluded coverage unless bodily injury caused the loss "directly and independently of all other causes and effected solely through an accidental bodily injury." J.S. App. 34a; 483 So.2d at 271. Appellant *knew* that exclusion was void under "well-established" Mississippi law, which required that policies with that language be interpreted to cover losses if the accidental bodily injury "played any part in the loss." J.S. App. 34a; 483 So.2d at 271. Despite that knowledge, Appellant repeatedly told Appellee that he could not recover under the policy unless he proved that his loss was caused "solely" by accidental injury "directly and independently of all other causes." J.S. App. 12a-18a; 483 So.2d at 260-63.[4] "In

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[3] R. 539, J.A. 16. The memo was received in evidence. *See* R. 507, 530-531. The memo acknowledged that "[u]ntil we know more about the condition and how (and whether) the alleged accident contributed to cause the loss we cannot very well apply the Mississippi law regarding proximate cause." *Id.* Eight days later, without obtaining further information, Appellant denied Appellee's claim for the fourth time. R. 571, J.A. 17. This time, unlike the three previous denials, Appellant did not even mention its medical director's opinion.

[4] These statements about the policy's coverage were knowingly false. The internal memo quoted *supra*, note 3, acknowledged that under Mississippi law, "there may be recovery under this type policy" if "the loss is the result of the combination of disease and

their dealing with Crenshaw, Bankers Life personnel knew they were under a duty not to give an invalid reason for denying his claim. This duty was violated." J.S. App. 35a; 483 So.2d at 271.

The Mississippi Supreme Court also found that Appellant "clearly recognized" it was "skirting a bad faith cause of action, but still played the odds." J.S. App. 47a; 483 So.2d at 276. Appellant was willing to "play the odds" because it mistakenly believed that Mississippi was only "a penalty state." J.S. App. 19a; 483 So.2d at 263.[5] In penalty states, there is a set penalty that can be awarded for bad faith refusal to pay an insurance claim (typically 10-20% of the contract liability). Appellant mistakenly believed that even if Appellee brought a bad faith action and won, he could recover, at most, only a $3,000 penalty. Thus, Appellant made a business decision to risk the possibility of a $3,000 penalty in order to keep and invest $20,000 it knew it should have paid.[6] As the trial judge noted in denying Appellant's post-trial motions, the trial testimony made it "very obvious" that Appellant believed Mississippi was "a penalty state" with a "fixed" penalty that was too small to be of any concern to Appellant.[7] R. 1243-44.

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accident." R. 539, J.A. 16. It nevertheless recommended that Appellant "point out" to Appellee's attorney, *contrary to Mississippi law*, "that we must have some substantiation that an injury caused this loss 'directly and independently of all other causes.'" J.S. App. 16a-17a; 483 So.2d at 262. That is what Appellant did. R. 571, J.A. 17.

[5] An internal memo from Appellant's claims supervisor records his incorrect belief that "this is a penalty state." R. 566.

[6] Appellant's gross investment income in 1980 was nearly $100 million. R. 768 (lodged with Court on July 27, 1987).

[7] A contingency fee based upon a maximum recovery of $23,000 provides little incentive for an attorney to undertake a protracted legal battle with a large and determined opponent. And most individual claimants are unable or unwilling to pay lawyers to litigate

The Mississippi Supreme Court further found that Appellant knowingly violated its "duty under the law to properly investigate any claim." J.S. App. 37a; 483 So. 2d at 272. Appellant knew that three "reputable doctors were of the opinion that trauma *did* play a part in the eventual amputation," which would entitle Appellee to policy benefits. J.S. App. 36a; 483 So.2d at 272 (emphasis added). It knew that "because of the absence of an emergency room report," its medical director had concluded "there was either no trauma or the trauma

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small claims, *particularly* if they have been told, falsely, that they can recover only if they prove an accident was the *sole* cause of their loss, independent of all other causes. Appellant knew that Appellee's base salary was only $7,176 per year, R. 82, and knew that Appellee knew his own doctors thought his injury was not the sole cause of his amputation. As the court below noted, Appellant falsely told Appellee he could not win unless he established facts that would be "a manifest impossibility in his case." J.S. App. 39a; 483 So.2d at 273. Faced with those odds, not many poor claimants would hire a lawyer to pursue a claim with a maximum value of $20,000-$23,000.

In penalty states, there is a strong business incentive for insurers to deny valid claims. For example, if Appellant denied 100 legitimate claims for $20,000 each, it would save (and earn investment income on) $2,000,000. If 10% of the denied claimants sued and recovered both contract damages and a 15% penalty, that would cost Appellant $200,000 for the contract claims it should have paid anyway, and $30,000 in penalties, for a total of $230,000. But Appellant would retain and receive investment income on $1,770,000 it should have paid. Even if *50%* of the denied claimants obtained counsel, and recovered both contract damages and 15% penalties, Appellant would still keep $850,000 it should have paid. In economic terms, in a penalty state the potentially enormous gains of bad faith refusal to pay insurance claims are worth the rather modest risk. Appellant's internal forms ask whether claimants are from "penalty states." R. 534. Obviously, Appellant was overtly concerned, in processing *all* claims, with whether it risked only modest "penalty" damages, or more substantial punitive damages, if it refused to pay the claim. Accordingly, because Appellant mistakenly believed Mississippi was a "penalty state," it made a deliberate business decision to "play the odds."

was insignificant," and knew that its medical director "noted the absence of an emergency room report in all of his written memos." J.S. App. 20a, 36a; 483 So.2d at 264, 271. Yet Appellant "made no attempt to get a copy" of that report. J.S. App. 36a; 483 So.2d at 271. In fact, before denying the claim, Appellant obtained "none" of the information its own internal procedures required it to obtain, even though Appellee had authorized it to do so. J.S. App. 33a; 483 So.2d at 270. "There was no interview of Crenshaw, no interview of any of his doctors, and no request for medical records." *Id.* Appellant "grossly violated its own in-house procedure for investigating a claim," because "a full and complete investigation posed a very strong likelihood of dissipating any contention that Crenshaw's trauma had absolutely nothing to do with the loss of limb." J.S. App. 46a-47a; 483 So.2d at 276.

The need to punish and deter such calculated, bad faith denials of insurance coverage is precisely why Mississippi, like many states, has made punitive damages available in these cases. Given the evidence in this case, the jury was plainly justified in awarding substantial punitive damages.

SUMMARY OF ARGUMENT

Point I: Section 11-3-23 should be analyzed under the rational basis test because it does not involve a suspect class or impinge on a fundamental right and did not prevent Appellant from exercising its right to appeal. The statute rationally furthers Mississippi's legitimate interests in discouraging frivolous or insubstantial appeals and in compensating successful appellees for the real but difficult-to-quantify intangible costs of prolonged litigation. It also furthers the public's interest in conserving judicial resources. It does not penalize a narrow or arbitrarily selected class of litigants. It applies

to all plaintiffs and all defendants who unsuccessfully appeal from money judgments or from other judgments with an ascertainable money value. States are entitled to great deference in establishing the procedures for enforcing their judgments. Because section 11-3-23 rationally furthers those legitimate state interests, it does not violate the Equal Protection Clause.

Point II: Appellant's Excessive Fines Clause and Due Process Clause challenges to the *size* of the punitive damage award were never presented below, even in Appellant's Petition For Rehearing. Those challenges cannot be heard on appeal, and they do not involve a conflict between lower courts or otherwise meet the Court's tests for discretionary grants of certiorari. Congress and state legislatures are actively considering legislation that would make it unnecessary to resolve the constitutional argument raised by Appellant—that punitive damage awards should be limited to the maximum monetary punishment authorized by the legislature for analogous conduct. In these circumstances, the tag-a-long writ of certiorari concerning these challenges to the size of the award should be dismissed as improvidently granted. *Mishkin v. New York*, 383 US 502, 512-13 (1966).

Point III: Appellant's Excessive Fines Clause argument has no merit because the Eighth Amendment has never been held to apply to *any* civil proceedings, and because there is no evidence that the framers of the Eighth Amendment intended that clause to limit the size of punitive damages awarded to private plaintiffs in civil tort litigation. The common law and colonial history is to the contrary. Indeed, no English or American court has ever endorsed the misleading interpretation of English common law Appellant urges on this Court. Furthermore, Appellant's proposed test for determining the "excessiveness" of an award would destroy the social utility of such awards, would be unworkable, and would require

courts to make policy judgments they are ill-equipped to make.

Point IV: Appellant's Contract Clause challenge to the award of *any* punitive damages was never raised below, and is not properly before the Court. Furthermore, it has no merit because the Contract Clause does not apply to judicial actions, *Tidal Oil Co. v. Flanagan*, 263 US 444, 451 (1923), and because the decision of the Mississippi Supreme Court was only concerned with *tort* law issues, and did not even arguably change the terms of Appellant's *contractual* obligations to Appellee.

Similarly, Appellant's "change of law" Due Process Clause challenge to *any* punitive award was not properly raised below, and has no merit. The Mississippi Supreme Court did not change the law in any respect. It expressly reaffirmed prior law. Furthermore, the jury awarded punitive damages under jury instructions embodying existing law that were proposed, or consented to, by Appellant.

ARGUMENT

Although Appellant discusses its challenge to section 11-3-23 of the Mississippi Code last, and only in passing (App. Br. 43-48), we will begin with that issue because, as we will show *infra*, it is the only issue properly before the Court.

I. SECTION 11-3-23 RATIONALLY PROMOTES SEVERAL LEGITIMATE GOVERNMENTAL INTERESTS IN A NONDISCRIMINATORY MANNER AND DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

This is *not* a case in which costs or penalties have prevented an indigent litigant from utilizing trial or appellate procedures available to others. Appellant fully utilized Mississippi's trial and appellate processes. Ap-

pellant's complaint is not that it has been prevented from appealing, but that having *exercised* that right it has been penalized because its appeal was unsuccessful.

The penalty statute applies to all parties, *whether plaintiff or defendant*, who unsuccessfully appeal from a money judgment. Appendix; *see, e.g., Eagle Lumber & Supply Co. v. Robertson*, 161 Miss. 17, 135 So. 499 (1931). And it applies in other cases *not* involving a money judgment where the money value of the dispute can objectively and readily be determined. Appendix; *see, e.g., Hart v. Catoe*, 393 So. 2d 1346 (Miss. 1981). Limiting the penalty to cases involving a readily ascertainable money value enables potential appellants to calculate the penalty before appealing, and permits the amount of the penalty (and thus its deterrent effect) to increase proportionally as the value of the dispute between the parties increases. But because the penalty does not apply to all appeals, Appellant contends that application of the penalty to it violates the Equal Protection Clause.[8]

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[8] Appellant's brief also refers once, in passing, to the Due Process Clause (App. Br. 44), but fails to explain how it supports Appellant's challenge to section 11-3-23. By providing a fair trial, and a right to appeal that Appellant exercised, Mississippi satisfied due process requirements. *Lindsey v. Normet*, 405 US 56, 77 (1972); *Ortwein v. Schwab*, 410 US 656, 659-60 (1973); *United States v. Kras*, 409 US 434 (1973).

Appellant argued below that it was denied due process because it was required to pay the penalty without a separate hearing to contest its appropriateness or legality. Appellant has not made that argument here, and it is meritless. First, Appellant was afforded a hearing on the merits of its appeal, and knew the penalty would be imposed if the appeal was unsuccessful. Appellant's position is no different from that of any other party who is given a hearing, knowing that there will be financial consequences if it does not prevail (*e.g.*, in some states, an unsuccessful appellant automatically must pay some or all of the costs of appeal and/or attorneys fees). None of this Court's prior decisions supports

A. Because Section 11-3-23, As Applied, Does Not Involve A Suspect Classification, Does Not Impinge On A Fundamental Right, And Does Not Prevent Access To The Courts, It Should Be Reviewed Under The Traditional Rational Basis Test.

Appellant conceded below that the statute could "be upheld as constitutional" if it is "rationally related to a legitimate legislative purpose and a logical connection . . . exist[s] between the statutory purpose and the classification created by the statute." J.S. App. 113a. That concession was compelled by this Court's prior decisions.

Despite its concession below, Appellant now indirectly suggests a standard of review that would prohibit *every* legislative classification that financially burdens some litigants, but not all, even if there were a rational basis for the classification. App. Br. 48. Indeed, under Appellant's standard, even a compelling state interest would apparently not save a classification that treated any class of litigants differently from any other class. *Id.*

This Court has repeatedly held that legislative classifications not involving suspect classifications or impinging on fundamental rights are "presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *E.g., City of Cleburne v. Cleburne Living Center*, 105 S. Ct. 3249, 3254 (1985). Thus, in *United States v. Kras*, 409 US 434, 436 (1973), the Court held that even where a statutory fee denied an indigent party access to bankruptcy proceedings, "the applicable standard, in measuring the propriety of Congress' classifica-

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Appellant's assertion that this is a denial of due process. Second, Appellant had ample opportunity to challenge section 11-3-23, either in its direct appeal or in a declaratory judgment action challenging the constitutionality of section 11-3-23. *See Lindsey* (declaratory judgment action challenging double bond provision); *cf. Ortwein* (parties challenging filing fee petitioned for writ of mandamus ordering appellate court to accept cases without payment of fees).

tion, is that of rational justification." And in *Ortwein v. Schwab*, 410 US 656 (1973) (per curiam), the Court rejected an indigent plaintiff's contention that an appellate court filing fee imposed on some civil litigants, but not others, constituted a denial of equal protection. Observing that the statute did not employ a suspect classification, the Court held that "[t]he applicable standard is that of rational justification." 410 US at 660. *See, e.g., Schweiker v. Wilson*, 450 US 221, 230 (1981); *Vance v. Bradley*, 440 US 93, 97 (1979).

Appellant does not argue that section 11-3-23 involves a suspect classification, or impinges on a fundamental right. Nor does Appellant argue that the risk of the financial penalty authorized by section 11-3-23 prevented it from exercising its right to appeal.[9] Accordingly, section 11-3-23 should be judged under the rational basis test.

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[9] Application of section 11-3-23 could conceivably prevent an impoverished litigant from exercising its right to appeal, though there is no record of section 11-3-23 being applied in that manner in its 130 year history. But Appellant does not have standing to challenge the constitutionality of section 11-3-23 as applied to such a hypothetical litigant. *See, e.g., Broadrick v. Oklahoma*, 413 US 601, 610 (1973) ("Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court."); *McGowan v. Maryland*, 366 US 420, 429 (1961) (general rule is that a litigant may only assert his own constitutional rights or immunities); *United States v. Raines*, 362 US 17, 21 (1960) ("[O]ne to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional."); *Lindsey v. Normet*, 405 US 56, 65 (1972). Moreover, a litigant able to pay a judgment will in all probability be able to pay 15% more. And the penalty does not prevent appeals because it is applied *after* resolution of the appeal, not before.

Even the principal case relied upon by Appellant, *Lindsey v. Normet*, 405 US 56 (1972), used a "mere rationality" test. In *Lindsey* the Court expressly rejected the tenants' argument "that a more stringent standard than mere rationality should be applied" to alleged restrictions on their right of meaningful access to trials and to appeals. 405 US at 73. The Court upheld a portion of the challenged statute that allegedly impaired access to trial courts by one class of litigants (tenants) because that classification was "rationally related" to a legitimate purpose. *Id.* at 74; *see also id.* at 70, 71. It struck down a different portion of the statute which effectively prevented that class of litigants from appealing, because that classification was "arbitrary and irrational." *Id.* at 79. Thus, the question here, as in *Lindsey*, is whether the statute satisfies the "mere rationality" standard.

B. Because Mississippi's Interests Are Legitimate, And Section 11-3-23 Rationally Furthers Those Interests, The Statute Is Constitutional.

If a full and fair trial on the merits has been provided, States are not constitutionally required to provide a right to appeal. *Lindsey*, 405 U.S. at 77.[10] Mississippi could have made all appeals discretionary, with the right to appeal dependent upon a threshold showing of substantial merit. But that would have imposed a serious burden on its judicial system, and would have required judges to make highly subjective judgments concerning the merits of appeals before they had the benefit of full briefing and argument. *Walters v. Inexco Oil Co.*, 440 So.2d 268, 275 (Miss. 1983). Instead, Mississippi granted all parties in civil cases an automatic right of appeal from all final judgments.

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[10] *Accord Jones v. Barnes*, 463 US 745, 751 (1983); *Ross v. Moffitt*, 417 US 600, 611 (1974); *Griffin v. Illinois*, 351 US 12, 18 (1956); *National Union of Marine Cooks and Stewards v. Arnold*, 348 US 37, 43 (1954); *McKane v. Durston*, 153 US 684, 686 (1894).

Mississippi also recognized, however, that "an unfettered automatic right of appeal brings its own evils." *Walters*, *supra*, at 275. Unsuccessful litigants may take "meritless appeals . . . to subject their adversaries to more costs and expense, to squeeze a favorable settlement out of an impecunious plaintiff, and for less laudable reasons." *Id.* Accordingly, since 1857, in order to discourage frivolous or insubstantial exercises of that right of appeal, to compensate successful appellees for the intangible costs of defending appeals, and to conserve judicial resources, Mississippi has imposed an automatic penalty on unsuccessful appeals if the judgment below is affirmed without any modification, no matter how slight.[11]

Section 11-3-23 is rationally related to these legitimate state interests. First, by discouraging civil appeals unless the appellant believes there is a reasonable chance that some portion of the judgment will be reversed or modified on appeal, the statute furthers the state's "interest in discouraging frivolous appeals." *Walters*, *supra*, at 274. Nearly every jurisdiction has acted to penalize frivolous appeals, and Appellant concedes that there is a "legitimate state interest" in doing so. App. Br. at 46-47.[12] That concession is fatal because section 11-3-23

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[11] *Walters*, *supra*, at 274; *Illinois Cent. R. Co. v. George*, 241 Miss. 233, 130 So. 2d 260 (1961); *Shipman v. Lovelace*, 215 Miss. 141, 60 So. 2d 559 (1952).

[12] *See* R. Lynn, APPELLATE LITIGATION 289-305 (1985). Many of these provisions authorize courts to impose a penalty payable to the appellee that exceeds the appellee's costs or proven damages. For example, this Court's rules authorize the Court to award "double costs . . . [i]n appropriate instances." S. Ct. R. 50. *See also*, 28 U.S.C. § 2103 (authorizing double costs). States have enacted a wide range of penalties for appeals that are frivolous or brought only for purposes of delay. *E.g.*, Ariz. Rev. Stat. Ann. § 12-2106 (authorizing penalty up to 10% of money damages, and $500 in other cases); Ga. Code Ann. § 5-6-6 (10% of judgment); Mich. Gen. Ct. Rule 816.5, 861.5 (punitive damages of up to 10% of any money judgment appealed); Me. Rev. Stat. Ann. tit. 14, § 1802 (treble costs); N.H. Rev. Stat. Ann. § 490.14-a (double costs

plainly furthers this concededly legitimate interest: it imposes a certain penalty for unsuccessful appeals, and therefore makes it uneconomical to pursue frivolous appeals.[13] Because section 11-3-23 discourages frivolous appeals, it is constitutional even if it also discourages insubstantial, but arguably non-frivolous appeals, because under the rational basis test, a statute may be substantially over-inclusive and yet be constitutional.[14]

Second, Mississippi has a legitimate interest in discouraging appeals that are *insubstantial* or that have little chance of success, even if they are arguably not frivolous, and a legitimate interest in compensating successful appellees for the real but intangible costs of defending an appeal. Section 11-3-23 rationally furthers

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and interest on money judgment at the rate of 12%); Or. Rev. Stat. § 19.160 (whenever money judgment is affirmed, decree shall award damages for delay in amount of 10% of the judgment, unless it is evident that there was probable cause for taking appeal); Pa. R. App. P. 2744 (damages at the rate of 6% in addition to legal interest on the judgment); Wisc. R. Civ. P. 809.25(3), 809.83(1) (penalty of up to 10% of judgment, in addition to damages for delay and reasonable attorneys fees).

[13] Although Mississippi could have chosen to impose the penalty only after a discretionary judicial finding that the appeal was "frivolous," the legislature could also rationally decide that a certain penalty for an "unsuccessful" appeal would be a better deterrent.

[14] *See, e.g., Vance v. Bradley*, 440 US 93, 108 (1979) (holding statute constitutional under rational basis test "[e]ven if the classification involved here is to some extent . . . ove inclusive"); *Ohio Bureau of Employment Services v. Hodory*, 431 US 471, 490-91 (1977); *Massachusetts Board of Retirement v. Murgia*, 427 US 307, 316 (1976) (where statutory approach "rationally furthered" legitimate interest, fact that a more narrowly tailored statute could achieve that interest did not render statute unconstitutional under rational basis test); *Dandridge v. Williams*, 397 US 471, 484 (1970) (finding otherwise rational statute unconstitutional for overinclusiveness "would be far too reminiscent of an era when the Court thought the Fourteenth Amendment gave it power to strike down state laws" it deemed unwise).

those interests. As this Court has recognized in many contexts, extended litigation entails significant costs for parties, and also for the State, even when it is not frivolous.[15]

Appellant does not deny that States may compensate successful appellees for the "costs, including attorneys' fees . . . incurred in defending the appeal." App. Br. 47. The "costs" of an appeal, however, are not limited to out-of-pocket expenses. They also include significant intangible costs that cannot be precisely measured, such as the emotional toll of participating in litigation and the strain of prolonged uncertainty in legal relations.[16] For example, how can you measure the emotional cost of forcing a successful plaintiff to loan the judgment he has recovered to the defendant while the case is pending on appeal, often (as here) for years.[17] Statutory post-judgment interest provides some compensation for the *economic* cost of delay in receiving payment, but no one

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[15] *See, e.g., University of Tennessee v. Elliot*, 478 US ——, 92 L.Ed.2d 635, 646 (1986) (discussing parties' interest in "avoiding the cost and vexation of repetitive litigation"); *Allen v. McCurry*, 449 US 90, 94 (1980) (discussing interest in relieving parties of cost and vexation of multiple law suits); *Montana v. United States*, 440 US 147, 153-54 (1979) (same); *Commission v. Sunnen*, 333 US 591, 597 (1948); *Reed v. Allen*, 286 US 191, 198-99 (1932); *Baldwin v. Iowa State Traveling Men's Association*, 283 US 522, 525 (1931); *Hart Steel Co. v. Railroad Supply Co.*, 244 US 294, 299 (1917).

[16] "The central role of adversary litigation in our society is to provide binding answers. We want to free people from the uncertain prospect of litigation, with all its costs to emotional peace and the ordering of future affairs." 18 C. Wright & A. Miller, FEDERAL PRACTICE & PROCEDURE § 4403 at 15 (1981).

[17] Appellee sued in November 1980. He was awarded judgment in December 1981. The judgment was affirmed in September 1985. The judgment was paid in April 1986. (Appellee did not pay the $20,000 contract portion of the judgment until then, even though on appeal it challenged only the punitive damage portion of the judgment).

else is forced to lend his money to a party who has injured him, even if he will eventually receive statutory interest on the loan. Furthermore, the injured plaintiff often needs the judgment *immediately* in order to secure necessary medical treatment, or just to survive. Judgment plus interest three years later may come too late to provide meaningful compensation.[18] The Constitution does not require Mississippi to ignore these and other intangible costs. Mississippi's decision to provide compensation for costs that are real and substantial, but defy precise measurement, is not irrational.

Insubstantial appeals also *directly* affect state interests because they require the expenditure of "time and energy and resources" (*Walters, supra*, at 275) by the State's appellate system, and thus implicate "the public's interest in conserving judicial resources." [19]

Appellant principally contends that even if section 11-3-23 *does* rationally further these legitimate state interests, it is "underinclusive" because it does not apply to all appellants, only to those who appeal from judgments with an ascertainable money value. App. Br. 47-48. That is constitutionally irrelevant because under the ra-

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[18] This economic reality often enables parties who appeal from money judgments "to squeeze a favorable settlement out of an impecunious" appellee. *Walters, supra*, at 275. The penalty statute lessens the pressure on needy appellees to settle for less than the judgment rather than defend a lengthy appeal, and thus furthers the State's interest in protecting the integrity of judgments.

[19] *Nevada v. United States*, 463 US 110, 129 (1983) (quoting *Southern Pacific R. Co. v. United States*, 168 US 1, 49 (1897)). *See also University of Tennessee*, 92 L.Ed.2d at 644; *Allen v. McCurry*, 449 US at 94; *Commission v. Sunnen*, 333 US at 597. Section 11-3-23 furthers this state interest by telling "the litigants that the trial itself is a momentous event, the centerpiece of the litigation, not just a first step weighing station en route to endless rehearings and reconsiderations. It is designed to deter litigants in our trial courts from trying their cases 'with one eye on the Supreme Court.'" *Walters, supra*, at 274-75.

tional basis test, a statute that rationally furthers a legitimate state interest is constitutional even if it is underinclusive.[20] Indeed, *Lindsey* upheld a statute that rationally furthered the state's interest in encouraging prompt judicial settlement of certain kinds of disputes, even though the statute "single[d] out possessory disputes between landlord and tenant for especially prompt judicial settlement" and treated "tenants of real property differently from other tenants for purposes of possessory actions." 405 US at 70-71. The Court ruled that the statute "cannot be faulted for over-exclusiveness or under-exclusiveness." 405 US at 70.

Similarly, in *Cohen v. Beneficial Industrial Loan Corp.*, 337 US 541 (1948), the Court upheld under the rational basis test a statute making unsuccessful plaintiffs in stockholder derivative actions liable for the defendant's expenses, including attorney's fees, even though the statute did not apply to plaintiffs who owned more than five percent of the defendant's stock or to plaintiffs in cases other than stockholder derivative suits. 337 US at 552-53.[21]

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[20] *E.g., Clements v. Fashing*, 457 US 957, 969, 971 (1982) ("The Equal Protection Clause allows the State to regulate 'one step at a time' . . . A regulation is not devoid of a rational predicate simply because it happens to be incomplete.") (quoting *Williamson v. Lee Optical Co.*, 348 US 483, 489 (1955)); *United States Railroad Retirement Bd. v. Fritz*, 449 US 166 (1980); *Vance v. Bradley*, 440 US 93, 108 (1979) (quoting *Phillips Chemical Co. v. Dumas School Dist.*, 361 US 376, 385 (1960)); *New York City Transit Authority v. Beazer*, 440 US 568, 592 (1979); *Massachusetts Bd. of Retirement v. Murgia*, 427 US 307, 314 (1976); *Dandridge v. Williams*, 397 US 471, 485 (1970); *Schweiker v. Wilson*, 450 US 221, 234-35 (1981).

[21] Many states compute penalties by reference to money judgments. *See* note 12, *supra*. Limiting the penalty to cases with ascertainable money values is rational for several reasons. Mississippi could rationally conclude that parties are more likely to file frivolous or insubstantial appeals in cases having an ascertainable money value than in other kinds of cases. They may want to force

The Court has ruled that penalty statutes like the one at issue are procedural mechanisms that do not affect the substantive rights of parties, only the procedures for enforcing those rights. *Burlington Northern Ry. Co. v. Woods*, —— US ——, 94 L.Ed.2d 1, 9 (1987). Furthermore, the Court has repeatedly recognized that states have legitimate and very strong interests in determining the appropriate procedures for operation of their judicial systems, including "the processes by which the [s]tate compels compliance with the judgments of its courts."[22] As the broad range of state and federal statutes and rules addressing concerns similar to those underlying section 11-3-23 reveals, the federal and state systems have employed many different methods to promote their interest in just and efficient trial and appellate systems.[23]

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a much lower settlement on a needy and impecunious appellee, or they may simply want to earn investment income, at higher than post-judgment interest rates, while the appeal is pending. Furthermore, the deterrent approach chosen by Mississippi, in which the penalty increases pro-rata as the value of the dispute between the parties increases, and in which the would-be appellant can calculate the amount of the penalty before deciding whether to appeal, can only be applied to appeals with an ascertainable money value.

[22] *Pennzoil Co. v. Texaco, Inc.*, —— US ——, 95 L.Ed.2d 1, 17 (1987). *See also Trainor v. Hernandez*, 431 US 434, 441 (1977) ("there are basic concerns of federalism which counsel against interference by federal courts . . . with legitimate state functions, particularly with the operation of state courts."); *Younger v. Harris*, 401 US 37, 44 (1971) (same).

[23] Holding section 11-3-23 unconstitutional would raise serious doubts about the constitutionality of many of those state and federal rules. For example, it would follow, *a fortiori*, that Fed. R. Civ. P. 68 (the offer of judgment rule) would be unconstitutional because that rule discourages *plaintiffs* from exercising their right to a *trial*, and subjects them to a mandatory and automatic monetary penalty even if their claims are *not frivolous* and they actually prevail at trial, unless they recover more than the defendant offered. In addition to this penalty, Rule 68 discourages plaintiffs from exercising their right to a trial by limiting their ability to recover attorneys fees in some cases, even where recovery of attorneys fees has been statutorily authorized. *See Marek v. Chesney*, 87 L. Ed. 2d

Whether section 11-3-23 embodies "the highest wisdom" or employs "the best conceivable" means to further that interest is irrelevant to whether it is rational. Many states have determined that penalty statutes are a rational way to promote just and efficient appellate systems. Virginia, Kentucky and Alabama have laws which, like section 11-3-23, impose mandatory penalties on unsuccessful appeals.[24] Other states have discretionary penalties for unsuccessful appeals. *See* note 12, *supra*. Although the details of these statutes vary, states should not be constitutionally foreclosed from adopting innovative approaches to further their legitimate interests.[25]

As long as legislative judgments about procedural rules do not employ suspect classifications, interfere with fundamental rights, or prevent access to trial and appellate systems, courts should not second-guess their wisdom simply because they do not uniformly affect all litigants. Instead, courts should adhere to the constitutional presumption that "absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process," *Vance v. Bradley*, 440 US 93, 97 (1979), and should uphold such legislative judgments unless they are not rationally related to legitimate state interests. Because section 11-3-23 satisfies the rational relationship test, the judgment below should be affirmed.[26]

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1 (1985). Notably, legislatures often authorize recovery of attorneys fees after determining that absent such recovery many plaintiffs cannot afford to seek vindication of their rights at trial.

[24] Ala. Code § 12-22-72 (1986); Ky. Rev. Stat. § 26A.300 (1985); Va. Code § 16.1-113 (Supp. 1986).

[25] *E.g., Federal Energy Regulatory Comm'n v. Mississippi*, 456 US 742, 788 (1982) (O'Connor, J., concurring in part, dissenting in part); *Chandler v. Florida*, 449 US 560, 579 (1981); *Reeves, Inc. v. State*, 447 US 429, 441 (1980); *Addington v. Texas*, 441 US 418, 431 (1979); *New State Ice Co. v. Liebmann*, 285 US 262, 311 (1932) (Brandeis, J., dissenting).

[26] *Lindsey* does not require a different result. The "double bond" provision the Court there found "irrational" is different from sec.

II. APPELLANT'S FEDERAL CONSTITUTIONAL CHALLENGES TO THE SIZE OF THE PUNITIVE DAMAGE AWARD WERE NEVER PRESENTED BELOW, AND SHOULD NOT BE CONSIDERED NOW.

Although Appellant's appeal is based on its challenge to Mississippi's penalty statute, that is not its main concern. Ninety percent of its brief is devoted to questions that are completely unrelated to the appeal question, and could not be considered on appeal: the constitutionality of the size of the punitive damages award, and of *any* such award in the circumstances of this case.[27] *Mishkin*

11-3-23 in three important respects. First, *Lindsey* involved poor tenants who claimed that the "double bond" provision would not merely penalize them for unsuccessful appeals but would actually prevent them from exercising their right of appeal. Accordingly, *before* eviction proceedings were filed against them, they brought an equitable action to enjoin enforcement of that provision. 405 US at 59-60. As the Court noted, "[t]he discrimination against the poor, who could pay their rent pending an appeal but *cannot post the double bond*, is particularly obvious. For them, as a practical matter, *appeal is foreclosed*, no matter how meritorious their case may be." 405 US at 79 (emphasis added). Second, the "double bond" required unsuccessful tenant-appellants to pay "twice the rents accruing during the appeal" if they lost. 405 US at 74-76. Thus, in contrast to the 15% penalty at issue here, that statute "doubled the stakes." 405 US at 79. Third, the double bond requirement applied only to a very small class of litigants. Unlike section 11-3-23, it applied (a) only to defendants, and (b) only to defendants who were tenants. Thus, tenant-defendants were subjected to a penalty "faced by no other civil litigant in Oregon." 405 US at 79. States do not have a legitimate interest in so favoring landlords at the expense of tenants. As Justice Douglas noted, "the double-bond procedure is landlord legislation." 405 US at 81 (dissenting on other grounds). Because of these three factors, none of which is present here, the Court concluded that the double-bond requirement was "arbitrary and irrational." 405 US at 79.

[27] Appellant's challenge to any punitive damage award, in any amount, is addressed in Point IV, *infra*. Appellant only asserts claims based on the Excessive Fines Clause and the Due Process

v. New York, 383 US 502 (1966) makes clear that even when an appeal is properly before the Court, the Court is not required to consider non-appealable issues, and will decline to do so if the standards for granting certiorari are not satisfied.[28]

Under the well established standards for granting certiorari, the Court should not consider Appellant's Eighth Amendment and Due Process challenges to the size of the award because: neither of those challenges was presented to or considered by the court below, at any stage; the alleged decision below is not in conflict with any other decision, state or federal;[29] the alleged decision below is not inconsistent with prior decisions of this Court; and it is not essential that the Court resolve these constitutional questions now—indeed, it would be inappropriate

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Clause. This case does not involve the very different question of whether the *First* Amendment restricts damage awards that might chill protected expression. Accordingly, the libel cases cited by Appellant and its supporting *amici* are not in point.

[28] *See also De Backer v. Brainard*, 396 US 28 (1969); 16 C. Wright & A. Miller, FEDERAL PRACTICE & PROCEDURE Sec. 4016 (1969) ("Even if there has been an unrestricted notation of probable jurisdiction, finally, the Court may vacate the implied grant of certiorari as improvident, or may simply refuse to determine the nonappeal issue.") (footnotes omitted). Any other rule would greatly expand the obligatory jurisdiction of the Court, and would require the Court to consider issues that were otherwise not appropriate for discretionary review simply because those issues were raised in a case that involved appeal issues.

[29] Appellant has cited no decision, and Appellee has found none, holding that the Excessive Fines Clause or the Due Process Clause limit the size of punitive damages in tort actions. To the contrary, *see Hart-Anderson v. Hauck*, Civ. No. 85-498 (Mont. March 17, 1987) (rejecting contention that punitive damage award violated the Excessive Fines Clause, holding that "the Eighth Amendment applies only to criminal actions"); *Palmer v. A.H. Robins*, 684 P.2d 187, 217 (Colo. 1984) (en banc) (same). *Cf., Daugherty v. Firestone Tire & Rubber Co.*, 85 F.R.D. 693, 695 (N.D. Ga. 1980) (rejecting claim that punitive damage award constituted cruel and unusual punishment).

to do so because Congress and state legislatures are actively considering legislative solutions that would make it unnecessary to resolve these constitutional questions.

A. Neither Of The Grounds Relied Upon By Appellant To Challenge The Size Of The Punitive Damage Award Was Raised Below.

1. *The Excessive Fines Clause argument was not presented to the court below at any stage, and is not a mere "enlargement" of arguments that were presented below.*

It is undisputed that Appellant did not cite or rely upon the Eighth Amendment, or the Excessive Fines Clause of that Amendment, at *any* stage of the proceedings below. J.S. 12 & n.3. The Court has repeatedly said that it cannot and will not "decide federal constitutional issues raised here for the first time on review of state court decisions." [30] Given that longstanding rule, Appellant is forced to argue, citing only *Dewey v. Des Moines*, 173 US 193 (1899), that "the Excessive Fines Clause argument is but an 'enlargement' of the argument made to the court below and therefore that Clause may be invoked here." J.S. 12 n.3. If a litigant has raised a particular federal question below, it may urge in this Court additional "arguments" regarding that question, even if those arguments were not asserted below.[31] But *Dewey*

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[30] *Cardinale v. Louisiana*, 394 US 437, 438 (1969); *District of Columbia Court of Appeals v. Feldman*, 460 US 462, 482 n.16 (1983); *Webb v. Webb*, 451 US 493, 499 (1981). *See Wilson v. Cook*, 327 US 474, 483-84 (1946); *McGoldrick v. Compagnie Generale*, 309 US 430, 434-35 (1940); *Whitney v. California*, 274 US 357, 362-63 (1927); *Tacon v. Arizona*, 410 US 351, 352 (1973); *Street v. New York*, 394 US 576, 582 (1969); *Bailey v. Anderson*, 326 US 203, 207 (1945).

[31] "Parties are not confined here to the same *arguments* which were advanced in the courts below *upon a Federal question there discussed.*" Having, however, "raised only one Federal question in the court below," Dewey was not permitted to raise a related but

makes clear that the "mere enlargement" doctrine does *not* permit litigants to raise in this Court constitutional "questions" not raised below.[32]

The Excessive Fines Clause question is not a mere "enlargement" of the questions that *were* raised below, because it is not "necessarily connected" to the questions that were raised "so that the state court could not have given judgment [on the questions that were raised] without deciding it." 173 US at 198-99. The Mississippi Supreme Court could have decided every question that was raised below without "necessarily" deciding the Excessive Fines Clause question raised here for the first time. As in *Dewey*, the federal question Appellant seeks to raise here had not "been brought to the attention of

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different federal question in this Court. 173 US at 198 (emphasis added).

[32] In the state courts, Dewey alleged that an assessment on lots owned by him, a non-resident with no actual notice of the assessment, to pay for paving a street abutting those lots was "greater than the reasonable market value of said lots," and objected that the defendants were seeking to enforce against him "not merely a sale of said lots, but also to compel plaintiff to pay the full amount of said tax regardless of whatever sum said lots may be sold for, and regardless of the actual value of the same," but he did not specifically challenge the *assessment* by reference to any provision of the constitution. 173 US at 200. Instead, he argued unsuccessfully that "the imposition of a personal liability against him in excess of the value of all the lots was not due process," in violation of the Fourteenth Amendment. *Id.* at 195. In this Court he attempted to raise the related question of whether the assessment itself amounted "to a taking of property without due process of law," because the assessment exceeded the value of the property. *Id.* at 197. The Court *rejected* that attempt, finding that Dewey's second due process question was *not* a mere "enlargement" of the due process question he *had* raised below, even though he had specifically alleged all of the "facts upon which the [second] question might have been raised," and even though he had specifically relied upon the federal Due Process Clause in support of the question he did raise below. *Id.* at 198.

the court below." 173 US at 200. Accordingly, as in *Dewey*, Appellant may not raise that question now.

2. *Appellant did not expressly challenge the size of the punitive damage award on federal Due Process grounds on appeal, in its petition for rehearing, or even in its brief in support of its petition for rehearing.*

Appellant's claim that its federal Due Process challenge to the *size* of the award was presented below (J.S. 10-11; App. Br. 1-2) is disingenuous. On direct appeal Appellant did challenge the "excessiveness" of the award, but not on federal (or state) Due Process grounds.[33] It did raise *a* Due Process Clause challenge, but that was a categorical challenge to *any* award of punitive damages, not a challenge to the excessiveness of this particular award.[34] Furthermore, even in its Petition For Rehearing Appellant did not expressly rely on any due process clause, state or federal, to challenge the excessiveness of the award.[35] The only reference to due process in connec-

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[33] In its appeal brief to the court below, Appellant urged that court to use its supervisory power to find the punitive damage award excessive because it was much larger than the compensatory award (pp. 21-22); it was excessive in light of statutes from other jurisdictions (pp. 22-23); it was allegedly too large in relation to the nature of Appellant's acts (pp. 23-24); and it was excessive in relation to Appellant's net worth (pp. 24-25). Appellant did not cite, rely upon, or even mention any due process clause in support of any of those arguments.

[34] Appellant argued that "the award" of punitive damages violated its due process rights because the mere possibility of large and allegedly unrestricted punitive damage awards "whenever an insurer litigates a contested claim, has a substantial 'chilling effect' on the exercise of [the] fundamental right" of "access to the courts." Brief Of Appellant to the Mississippi Supreme Court 33-34. Appellant has abandoned this particular Due Process claim, and has not pressed or argued it here.

[35] The unspecified "constitutional principles" Appellant did mention in the Petition, whether state or federal, are apparently the

tion with Appellant's challenge to the size of the award is a passing reference in its Brief in Support of Petition For Rehearing, and even that reference is not expressly grounded in the federal Due Process Clause.[36]

Furthermore, Appellant did not raise these Excessive Fines or Due Process questions in its answer, at trial, in post-trial motions, or in its assignment of errors on appeal. Appellant does not and could not claim that these questions arose with urgency only after affirmance of the trial court judgment. Accordingly, under well-established and consistently-applied state practice, the Mississippi Supreme Court would properly have refused to consider

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"criminal safeguards and burden of proof" mentioned in the next sentence. Appellant has abandoned its reliance on those "constitutional principles" and has not pressed or argued them here. Furthermore, Appellant cannot complain that the jury used a preponderance standard, because that is the standard Appellant proposed in its jury instructions, which the court gave. R. 1138, J.A. 20; R. 1141, J.A. 21. And the preponderance standard is sufficient for "even severe civil sanctions." *Herman & MacLean v. Huddleston*, 459 US 375, 389 (1983); *Sedima v. Imrex Co.*, 473 US 479 (1985).

[36] The brief states, without elaboration or citation of authority, that the size of the award "violates due process, equal protection and other constitutional standards." (P. 9). This reference does not properly raise a federal claim. First, it could as well have been a reference to the due process clause of the Mississippi Constitution (Art. 3, sec. 14) as to the federal constitution. Accordingly, it will be deemed to refer to the state constitution. *Bowe v. Scott*, 233 US 658, 664-65 (1914); *New York ex rel. Bryant v. Zimmerman*, 278 US 63, 67-68 (1928); *Webb v. Webb*, 451 US 493, 497-501 (1981). Second, such a conclusory and unsupported reference is insufficient to raise a constitutional issue below. *Beck v. Washington*, 369 US 541, 553 (1962); *Webb*, 451 US at 498 n.4; *Stembridge v. Georgia*, 343 US 541, 547 (1952). Third, "[b]riefs and oral arguments before state courts . . . cannot be used to establish that a federal question was raised. *Live Oak Ass'n v. Railroad Commission*, 269 US 354, 357-58 (1926); *Lynch v. New York ex rel. Pierson*, 293 US 52, 54 (1934)." Stern, Gressman & Shapiro, SUPREME COURT PRACTICE 157 (6th ed. 1986).

those questions even if Appellant had unambiguously raised them in its Petition For Rehearing.[37]

B. The Court Should Not Consider A Constitutional Rule Limiting Punitive Damage Awards To The Maximum Monetary Punishment Authorized By The Legislature For Analogous Conduct Because Legislative Bodies Are Actively Considering Legislation That Would Make It Unnecessary To Resolve That Constitutional Question.

Punitive damages are subject to legislative restriction or even abolition. Several legislative bodies have enacted specific limitations on punitive damage awards.[38] And Congress and many other state legislatures are actively considering a broad range of restrictions on punitive damage awards.[39]

In these circumstances, it is not only unnecessary, but inappropriate, for the Court to rule that the constitution requires parity between puntive damage awards and leg-

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[37] *State v. Cabana Terrace, Inc.*, 153 So.2d 257, 260 (Miss. 1963). *Educational Placement Services v. Wilson*, 487 So.2d 1316, 1320 (Miss. 1986); *Mississippi State Highway Commission v. Rives*, 271 So.2d 725, 729 (Miss. 1973); *Hogan v. Cunningham*, 172 So.2d 408, 411 (Miss. 1965); *Comfort v. Landrum*, 52 So.2d 658, 659 (Miss. 1951); *Estes v. Memphis & C. Ry. Co.*, 119 So. 199, 202 (Miss. 1928).

[38] Appellant cites many of those legislative restrictions on punitive damages. App. Br. 12 n.1. As Appellant notes, several state legislatures have recently imposed limits on the size of punitive damage awards that can be granted in cases of bad faith refusal to pay insurance claims. App. Br. 35 n.18. Appellant does not argue that any of those legislatively imposed limits is unconstitutionally high. Thus, legislatures are beginning to address Appellant's concerns in ways that would make it unnecessary to resolve the constitutional issues Appellant raises here.

[39] *See* the Tort Litigation Reform Act of 1987, S. 554, introduced Feb. 19, 1987 and pending in the U.S. Senate Judiciary Committee. *See generally* Senate Report 98-476, 98th Cong., 2d Sess., on S. 44, and the *amicus* brief of Association of Trial Lawyers of America.

islatively authorized monetary punishments for analogous conduct, thereby preventing state legislatures from weighing the competing policy concerns and experimenting with varying solutions to whatever problems there may be. *See* note 25, *supra*.

* * * *

In sum, not one of Appellant's federal constitutional challenges to the size of the punitive damage award was considered by or presented to the Mississippi Supreme Court, and there is no conflict or urgent reason why this Court should resolve those issues now. Accordingly, the Court should dismiss the writ of certiorari with respect to those tag-a-long issues as improvidently granted. *Mishkin*, *supra* at 512-13; *De Backer*, *supra* at 32. Here, as in *Mishkin*, "the far-reaching and important questions tendered by this claim are not presented by the record with sufficient clarity to require or justify their decision." 383 US at 512-13. Here, as in *De Backer*, "given the barrenness of the record on this issue," the Court should "decline to pass on it." 396 US at 32.

III. THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT DOES NOT APPLY TO *ANY* CIVIL PROCEEDINGS, AND SHOULD NOT BE CONSTRUED TO RESTRICT PUNITIVE DAMAGE AWARDS TO THE MONETARY PUNISHMENTS FIXED BY STATUTE FOR ANALOGOUS CRIMINAL CONDUCT.

A. The Eighth Amendment Does Not Apply To *Any* Civil Proceedings.

In *Ingraham v. Wright*, 430 US 651 (1977), which is controlling and requires rejection of Appellant's claim, the Court squarely held that the Eighth Amendment does not apply to *any* civil proceedings.[40] It "was designed to

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[40] The Court noted that "the applicability of the Eighth Amendment always has turned on its original meaning, as demonstrated by

protect those *convicted of crimes.*" 430 US at 664 (emphasis added); *see also id.* at 671 n.40 (Amendment applies only after "a formal adjudication of guilt"). As the Court noted, the Eighth Amendment (like its common law predecessors) was designed to limit the power of *government* to fine or punish for its own benefit (430 US at 664), and was not intended to apply to "civil remedies" made available by government but "designed for the benefit of other parties." *Id.* at 668.[41] Thus, every case in which the Eighth Amendment has been found applicable involved a punishment which only the government itself could impose.[42]

Despite *Ingraham*, under the constitutional test proposed by Appellant, if a "civil" monetary award serves the functions of punishment and deterrence, it is subject to the Eighth Amendment and must be found excessive if it exceeds the criminal fine authorized for comparable

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its historical derivation." 430 US at 670 n.39. The Court relied heavily on that history. For example, the English Bill of Rights, from which the text of the Eighth Amendment was derived, provided that "excessive Baile ought not to be required nor excessive Fines imposed nor cruel and unusual Punishments inflicted." As the Court noted in *Ingraham*, "Blackstone treated each of the provision's three prohibitions as bearing only on criminal proceedings and judgments." 430 US at 665 (footnote omitted).

[41] Quoting *Uphaus v. Wyman*, 360 US 72, 81 (1959). In *Uphaus*, a court had found a party in contempt and ordered him jailed until he complied with the court's order. This Court rejected the contention that this "indefinite sentence" violated the Eighth Amendment, reasoning that in these circumstances even incarceration was "essentially a civil remedy designed for the benefit of other parties" rather than for the benefit of the state. *Id.*

[42] The majority and the dissent in *Ingraham* differed as to whether the defendant in *Trop v. Dulles*, 356 US 86 (1958) (plurality opinion) had been punished because of a conviction for desertion, or because of a dishonorable discharge from military service. *Compare* 430 US at 666-67 (majority) *with* 430 US at 687 n.3 (dissent). In either event, the punishment—expatriation and loss of citizenship—was a punishment only the government could impose.

conduct. Under that test, treble damage awards for violation of state and federal antitrust laws, environmental protection laws, laws authorizing civil penalties, and a broad range of other civil laws, would violate the Eighth Amendment. The federal RICO statute, for example, would violate the Eighth Amendment because it authorizes treble damages, as punishment and deterrence, for conduct that is criminal in nature, and does not limit those damages to the amount of the criminal fine authorized for that conduct. *See* 18 U.S.C. §§ 1963, 1964(c); *Sedima v. Imrex*, 473 US 479, 481-83, 491-92 (1985).

But even if the Eighth Amendment could be construed, as Appellant urges, to apply to *some* types of "civil" proceedings—for example, to proceedings *by government* to obtain a monetary fine or penalty *payable to government* for conduct that would also violate a criminal statute—there is no basis in history, and no reason in policy, to apply the Excessive Fines Clause to the civil tort proceeding at issue here.

In order to prevail on its Eighth Amendment claim in this case, Appellant must persuade the Court to rule, for the first time, not only that the Excessive Fines Clause of that Amendment applies in civil proceedings, but also that it applies in a civil tort proceeding brought by a private party; that it applies in state courts;[43] that it protects corporate entities;[44] that it imposes substantive

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[43] *See Eilenbecker v. District Court*, 134 US 31 (1890); *Pervear v. Massachusetts*, 5 Wall. 475 (US 1867) (Excessive Fines Clause is not applicable to states). *See* the discussion of this point in the *amicus* brief of Association of Trial Lawyers of America.

[44] *See Koway Enterprises, Inc. v. Pennsylvania Public Utility Commission*, 85 Pa. Comm. 1, 480 A.2d 1317 (1984) (holding that Cruel and Unusual Punishment Clause does not protect corporations and noting that "our research has not discovered any case . . . which extends the Constitutional protection against cruel and unusual punishment to corporate entities"); *cf. California Bankers Ass'n v. Shultz*, 416 US 21 (1974) (protection against compulsory self-incrimination does not apply to corporations); *United States*

limits on the amount of punitive damages that can be awarded *to private plaintiffs* in such proceedings; that the maximum amount that can be awarded is not within the broad discretion of the jury (subject to the supervisory powers of state courts), but is fixed by the maximum amount of the "fine" the legislature has chosen to specify as *one* of the criminal punishments for "similar or analogous improper business activities"; and that the award cannot exceed that amount regardless of the gravity of the defendant's conduct or the particular circumstances of the case even if that amount would be insufficient to deter the defendant, or others similarly situated, from similar conduct in the future.

To support these radical propositions, which would fundamentally change the scope and meaning of the Eighth Amendment, Appellant relies almost entirely on a lengthy but distorted analysis of the common law, particularly of the restrictions on "amercements" imposed by Magna Carta.

B. There Is No Evidence That The Framers Of The Eighth Amendment Intended The Excessive Fines Clause To Limit The Size Of Punitive Damages Awarded To Private Plaintiffs In Civil Tort Litigation.

There is no direct evidence that the framers of the Eighth Amendment intended the Excessive Fines Clause to limit the size of punitive damages awarded to private plaintiffs in civil tort litigation, and Appellant does not contend there is. Although punitive damage awards were available in civil tort cases prior to adoption of the Eighth Amendment, no case or commentator had ever suggested that they were subject to the restrictions of

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v. Morton Salt Co., 338 US 632 (1950) (right to privacy does not apply to corporations); *First National Bank of Boston v. Bellotti*, 435 US 765, 778-79 n.14 (1977) ("certain 'purely personal' [constitutional] guarantees . . . are unavailable to corporations").

Magna Carta or the English Bill of Rights, and they were not.[45] The total absence of caselaw support for Appellant's theory is not the result of two centuries of judicial insensitivity or ignorance. To the contrary, courts have never adopted Appellant's theory because the concerns underlying the restrictions on "amercements" and "fines" in Magna Carta and the English Bill of Rights (and on Excessive Fines in the Eighth Amendment), are completely different from the concerns Appellant has with punitive damages. Although Appellee disagrees with much of what Appellant and its supporting *amici* have to say about the history of Magna Carta, the English Bill of Rights, and English common law, even the points about which we agree are sufficient to demonstrate that the concerns underlying Magna Carta and the English Bill of Rights have no application to punitive damage awards to private plaintiffs in civil cases. In particular, the parties agree that:

1. "Amercements," and later "fines," were paid *only to the King*; unlike punitive damages, they were never paid to private litigants.

2. "Amercements," and later "fines," were payable to the King not just for great or serious offenses, but even for minor and trivial offenses.

Thus, unlike punitive damages, which can be awarded only in cases involving particularly culpable and reprehensible behavior, amercements were payable in *every* case. Amercements were so common, and were payable for such trivial offenses, that "most men in England must have expected to be amerced at least once a year."[46]

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[45] For additional discussion of this point, *see amicus* brief of Consumers Union of United States, Consumer Federation of America, and the National Consumers League.

[46] 2 Pollock & Maitland, THE HISTORY OF ENGLISH LAW 513 (2d ed. 1909) "In the thirteenth century amercements are being inflicted right and left upon men who have done very little that is wrong." *Id.* "No one could expect to pass through life (perhaps

3. For that reason, amercements became an important source of revenue to the King, on which the King greatly depended.[47]

Englishmen were understandably concerned that amercements would be set in large amounts even if the offender's conduct did not warrant that amount, simply because the King needed sizeable revenues. This "revenue-generating" concern was irrelevant to punitive damage awards, which were not payable to the King (and are not now payable to the government), and have never been a source of governmental revenue.

4. Persons subject to amercements were entirely "in the king's mercy." [48] Accordingly, the King, *to whom the amercement was payable*, set the amount of the amercement he would require to be paid before he would grant his mercy.

Englishmen were concerned that the King, to whom the amercement was payable, could himself set the amount, particularly because amercements were such an important source of revenue to the King. Because of this concern, Magna Carta provided that even though the King or his officers could continue, initially, to set the amount of the amercement, ultimately, the amount was subject to the judgment of a jury. This concern was and

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hardly through a single year) without being subjected to amercements." McKechnie, MAGNA CARTA 287 (2d ed. 1958).

[47] "In the early thirteenth century the income of England was growing and John could not tap it by any legal means. His royal expenses were increasing by the month and he could not press them down. Again and again the hard and calculating king tried new, ingenious, and often unscrupulous methods to raise money." Smith, A CONSTITUTIONAL AND LEGAL HISTORY OF ENGLAND 131 (1955).

[48] "The process is this:-So soon as the offender's guilt is proved, the court declares that he is in mercy (in misericordia)." 2 Pollock & Maitland, *supra*, at 513. "Strictly speaking, the man's life and limbs and all that he had were at the King's mercy." McKechnie, *supra*, at 286.

is irrelevant to punitive damage awards because the plaintiff, to whom the award is payable, does not himself set the amount of the award, even initially; the amount is determined by a jury.

In view of these differences, it is not surprising that in Appellant's lengthy discussion of the common law, consuming four-fifths of its brief, Appellant has failed to cite a single English decision holding that the restrictions in Magna Carta and the English Bill of Rights on the size of "amercements" or "fines" also restricted the size of punitive damages paid to private parties in civil litigation. Appellant has also failed to cite a single colonial decision to that effect. The absence of such case-law is not accidental. English common law has always regarded punitive damages awarded to private plaintiffs in tort cases as completely different from amercements or fines payable to the Crown. Therefore, the amount of such damages has never been restricted by Magna Carta or the English Bill of Rights, but only by the judge-made common law rule that the amount not be so outrageous as to shock the conscience.

Thus, in the first English case explicitly recognizing punitive damages, *Huckle v. Money*, 95 Eng. Rep. 768 (1763), the court refused to set aside an award of "exemplary damages" of 300 pounds, even though "the personal injury done to [plaintiff] was very small" so that damages of "perhaps 20 [pounds] would have been" sufficient to compensate the plaintiff for his injury. 95 Eng. Rep. 768-69. The Court was certainly aware of Magna Carta, which it cited twice in its opinion (*id.* at 769) as relevant to other issues. But on the issue of the alleged excessiveness of the exemplary award, it expressly ruled that "the law has not laid down what shall be the measure of damages in actions of tort; the measure is vague and uncertain, depending upon a vast variety of causes, facts, and circumstances." *Id.* at 768. The court held that it is the province of the jury to assess

tort damages, remarking "that it is very dangerous for the Judges to intermeddle in damages for torts; it must be a glaring case indeed of outrageous damages in a tort, and which *all mankind at first blush must think so*, to induce a Court to grant a new trial for excessive damages." *Id.* at 769 (emphasis added).

Later that year, in a tort action between private parties, the court refused to set aside another "exemplary damages" award that was allegedly excessive, holding again that the jury "are the proper judges of the damages." *Grey v. Grant*, 2 Wils. K.B. 252, 95 Eng. Rep. 794, 795 (1764). Two years later, in another tort action between private parties, the court refused to set aside a jury award that was allegedly excessive even though Lord Mansfield "acknowledged that he thought the damages were very great, and beyond the proportion of what the [plaintiff] had suffered." *Benson v. Bart*, 3 Burr. 1846, 97 Eng. Rep. 1130 (1766). Nevertheless, although the damages were much larger than would be appropriate as compensatory damages, the award was within the discretion of the jury.

Between 1763 and 1791, when the Eighth Amendment was ratified (and even to the present day), no court applied the restrictions on "amercements" or on "fines" contained in Magna Carta or the English Bill of Rights to the right of civil plaintiffs to recover exemplary or punitive damages in tort actions. Accordingly, when Blackstone published his Commentaries in 1768, it is not surprising that the only situations he mentions in which Magna Carta or the English Bill of Rights even arguably restricted the amount of a monetary payment were situations "in which, if the private plaintiff prevailed, the defendant was required to pay a fine *to the Crown*." [49]

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[49] *Amicus* brief of Aetna Life Insurance Co., et al. at 20 (emphasis added) (citing 3 W. Blackstone, *Commentaries on the Law of England* *118-19, *138, *179, *188, *398, *402 (1768)).

This was the history with which the framers of the Eighth Amendment were familiar. It was a history in which English common law had restricted the size of monetary payments to the Crown, but had not imposed any restrictions on the size of monetary payments to private litigants except the judge-made restriction that they not shock the conscience. Absent any indication (and Appellant and its supporting *amici* have provided none) that the framers of the Eighth Amendment intended to constitutionalize and confer on defendants in purely private tort litigation *greater* rights than they had been accorded by English common law, or by the Colonial courts, it would be inappropriate at this late date in our constitutional history to impute such an intention to the framers.

The history of punitive damage awards in the century *after* the Eighth Amendment was adopted confirms this understanding. Appellant twice cites W. Hale as an authority on this subject (App. Br. 28, 31), though misleadingly. Hale describes the "well-established principle" that juries may award punitive damages, "by way of punishment and warning," that are based on "the enormity of [the] offense rather than the measure of compensation to the plaintiff." W. Hale, HANDBOOK ON THE LAW OF DAMAGES 301, 301 n.1 (2d ed. 1912). Hale explains, *supra*, at 303, that:

> "the principle owes its origin to the old rule that the jury were the sole judges of the damages. Then, as now, when a wrong was accompanied by circumstances of aggravation, the jury was prone to return a verdict for large damages, *which the court was powerless to set aside.*"

C. Appellant's Proposed Standard For Determining Whether A Punitive Damage Award Is Excessive Within The Meaning Of The Excessive Fines Clause Would Destroy The Social Utility Of Such Awards, Is Not Supported By History, And Would Be Completely Unworkable.

Appellant argues that the standard for measuring "the excessiveness of a punitive damage award imposed by a civil jury should be the relationship of a punitive damage award to the monetary punishment exacted by the legislature of that jurisdiction (and, as necessary, other jurisdictions) for the same or similar conduct." App. Br. 35.[50] This is not a new argument. It has been raised and rejected before. In his summary of case law at the turn of the century, after noting the argument, Hale observes that while statutes limit "the pecuniary fine upon a criminal prosecution for such an act, there is but a vague limit to the exemplary damages which a jury may find in a civil action." Hale, *supra*, at 306.[51]

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[50] Appellant does not suggest any standard for determining whether a *legislatively authorized* punishment is excessive. Its standard assumes that all legislatively authorized punishments are constitutional, an assumption that was squarely rejected in *Solem v. Helm*, 463 US 277, 288 n.14, 290 (1983).

[51] This Court has rejected arguments very similar to the argument pressed by Appellant. In *United States v. United Mine Workers of America*, 330 US 258, 304-05 (1947), the Court held that "a fine of $700,000 . . . would not be excessive as punishment" for a criminal contempt, even though the maximum criminal fine for the underlying conduct was $5,000. The majority squarely rejected Justice Murphy's dissenting opinion, which argued that "when Congress prescribes a maximum penalty for criminal violation of a statute, that penalty fixes the maximum that can be imposed . . . for contempt for violating an order" to obey the criminal statute. 330 US at 382. More recently, in *Silkwood v. Kerr-McGee Corporation*, 464 US 238 (1984), this Court considered whether a punitive damage award of $10,000,000 in a case arising out of a plutonium leak from a nuclear facility was preempted by federal law authorizing a maximum civil fine for such conduct of $25,000. 464 US at 283 n.13. Relying on Congress' comprehensive regulation of nuclear facilities and the need for uniform laws governing those facilities,

Requiring parity between punitive damage awards and criminal fines would completely destroy the social utility of such awards, which have been available in most states for many years.[52] Because criminal fines are usually only one element of the criminal penalty, they are usually relatively small. In cases (such as this) where the defendant can gain enormous profits by engaging in the conduct the state's tort law seeks to discourage, the prospect of an occasional and relatively modest financial penalty, the size of which can be calculated in advance, will not deter that conduct.[53] The possibility of the penalty will simply be treated as a cost of doing business. For this reason, it is not surprising that Appellant's proposed test for measuring the excessiveness of punitive damage awards has never been adopted by any court, and finds no support in the history of Magna Carta or the English Bill of Rights.

1. *Under Magna Carta and the English Bill of Rights, excessiveness was not measured by reference to legislatively fixed monetary punishments.*

Magna Carta did not require proportionality between amercements and monetary punishments exacted by Par-

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Justice Powell's dissent argued that "[b]y establishing maximum fines, Congress implicitly stated its views on the size of monetary penalties it deemed sufficient to achieve both punishment and deterrence." *Id.* A majority of the Court rejected this view. Recognizing that large punitive damage awards complement, rather than undercut, smaller legislatively prescribed fines, the Court held that "the award of punitive damages in the present case does not conflict" with the federal remedial scheme. 464 US at 257. *Cf. Tull v. United States*, —— US ——, 107 S. Ct. 1831, 1838 n.7 (1987) (noting that punitive damages "is not a fixed fine.").

[52] *Day v. Woodworth*, 54 US (13 How. 363 (1851)); *Martinez v. State of California*, 444 US 277, 282 (1977); *Silkwood v. Kerr-McGee Corp.*, 465 US 238, 258 (1984).

[53] That is particularly true in bad faith insurance cases because the compensatory portion of the award will almost never exceed the policy benefit the insurer should have paid anyway.

liament because there were no such punishments. The amercement was, itself, the equivalent of a criminal fine. *Solem v. Helm*, 463 U.S. 277, 284 n.8: "An amercement was similar to a modern-day fine. It was the most common criminal sanction in 13th-century England." It was the *only* fine or monetary punishment exacted by the government. Accordingly, Magna Carta only required proportionality between the amount of the amercement *and the offender's conduct*.[54] If the amercement was proportional to the gravity of the offense, it could be assessed in any amount, so long as it did not deprive the offender of the means of livelihood.[55] Obviously, an amercement that was less than one percent of a merchant's net worth (as is the punitive damage award here) would not deprive that merchant of his livelihood, and would not have been considered excessive under Magna Carta.

Subject only to these "proportionality to the offense" and "livelihood" restrictions, the jury had unlimited discretion to determine the appropriate amount of the amercement by taking into consideration all the circumstances of the case, including "the offender's wealth or poverty, . . . [and] all those 'circumstances of the particular case' that the rigid rules of ancient law had ignored." 2 Pollock & Maitland, *supra*, at 514.[56] Indeed,

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[54] 2 Pollock & Maitland, *supra*, at 515 ("amercements should vary with the gravity of the offense"); McKechnie, *supra*, at 286, 288.

[55] "In no case could the offender be pushed absolutely to the wall: his means of livelihood must be saved to him." McKechnie, *supra*, at 287; *id.* at 288-89; 2 Pollock & Maitland, *supra*, at 515. As Blackstone explained, this restriction "means *only*, that no man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear; saving . . . to the trader his merchandize." 4 Blackstone, *supra*, at 379 (emphasis added).

[56] *See also* 4 Blackstone, *supra*, at 379 (amercements to be taxed "according to the *particular* circumstances of the offence and the offender."); McKechnie, *supra*, at 286 ("the amounts taken were

as Blackstone noted in 1786, when amercements had been replaced by criminal fines, even those fines usually varied according to the defendant's ability to pay:

> . . . the duration and quantity of [imprisonment and fines] must necessarily vary, from the aggravations or otherwise of the offense, the quality and condition of the parties, and from innumerable other circumstances. The *quantum*, in particular of pecuniary fines neither can, nor ought to be, ascertained by any invariable law. The value of money itself changes from a thousand causes; and, at all events, *what is ruin to one man's fortune, may be a matter of indifference to another's.* . . . Our statute law has not therefore often ascertained the quantity of fines, *nor the common law ever.*"

4 Blackstone, *supra*, at 377-78 (first emphasis in original).[57]

In support of its claim that Magna Carta required proportionality between amercements and legislatively fixed monetary punishments (App. Br. 38), Appellant cites only one case, which does not support its claim. The *Earl of Devon's Case*, 11 State. Tr. 1354 (1689), was a *criminal* prosecution for a minor assault. There

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regulated partly by the wealth of the offender, and partly by the gravity of the offense").

[57] In *Day v. Woodward*, 54 US (13 How.) 363, 371 (1851), the Court noted that punitive damage awards also had "been always left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the particular circumstances of each case." In this case the jury found that Appellant's contemplation of the possibility of a $3,000 penalty (arising from Appellant's mistaken belief that Mississippi was only a "penalty state"), was a matter of indifference to Appellant. Obviously, a punitive damage award of $1,000, which is the maximum criminal fine authorized by the Mississippi statute Appellant contends is analogous (App. Br. 14 n.3 & 33), would be a matter of complete indifference to Appellant, and would not deter it or other insurance companies from similar conduct in the future.

was no jury. The defendant pleaded guilty, and the judges imposed an immense criminal fine of 30,000 pounds. On appeal, the defendant challenged the excessiveness of the fine on many grounds, chief of which was that the fine was disproportional to the offense.[58] As we have explained, *that* argument *was* rooted in the principles of Magna Carta. The defendant also argued that there were *additional* restrictions on the size of criminal fines that judges, acting without juries, could impose. 11 St. Tr. at 1363-64. The defendant advanced six arguments in support of this claim, the fifth of which —mentioned in passing in one sentence—was that "wherever the law has set down a fine . . . it seldom exceeds 2,000 [pounds]." 11 St. Tr. at 1364.

The two paragraph opinion of the House of Lords setting aside the fine does not adopt or even mention that argument, and does not compare the size of the fine with the size of other fines authorized by Parliament. There was no need to do so because the fine was disproportional to the *offense*, and thus in violation of Magna Carta.[59]

Thus, the sole authority cited by Appellant to support its central argument in this case—that the common law "inquired into excessiveness—by reference to the more recent development of statutes as the primary means of setting criminal punishments," App. Br. 39—is nothing more than a one sentence argument raised by a litigant three centuries ago. The *Earl of Devon's Case* does not support Appellant's proposed test for measuring exces-

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[58] 11 St. Tr. at 1364: "the offence and punishment do not seem to bear a proportion."; *id.* at 1366: "I conceive with submission, that the punishment and offence don't in any measure bear proportion."

[59] The House of Lords held "that the fine of 30,000 [pounds] imposed by the court of King's-bench upon the earl of Devon, was excessive and exorbitant, against Magna Charta, the common right of the subject, and against the law of the land." 11 St. Tr. at 1370.

siveness even as applied to criminal fines imposed by judges, and certainly not as applied to awards, by juries, of exemplary damages.

In sum, Appellant's contention that Magna Carta requires proportionality between the amount of an amercement and the amount of legislatively fixed monetary punishments is baseless. Under Magna Carta, the gravity of the offense and the "livelihood" of the offender were the sole criteria for determining whether an amercement was excessive. Within those criteria, the jury had unlimited discretion.

2. *Appellant's test for measuring excessiveness would be completely unworkable, and would require courts to make substantive and policy judgments they are ill-equipped to make.*

In violation of this Court's rules, Appellant fails to "specify[] with particularity the relief" it seeks. Rule 34.1(j). That is not surprising. Using Appellant's test to fashion relief in this case, and in other punitive damages cases, would require courts to resolve innumerable questions. If punitive damages are to be limited to the maximum analogous criminal fine, how is a court to determine whether there *are* analogous crimes (in that jurisdiction or others), and if there are several, which is the most analogous?[60] If the scienter requirement in the criminal statute is less demanding than the standard for punitive damages, is the criminal statute, and its fine for less culpable conduct, analogous? If the criminal fine does not fix the absolute upper limit, but is only a guideline, what standard should courts employ in deciding whether

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[60] In Mississippi there is no closely analogous crime. There are several remotely analogous crimes. For example, Miss. Code Ann. Sec. 97-23-25 authorizes a $1,000 fine *and* ten years in jail for fraudulent appropriation of money delivered on deposit "or on any other contract or trust" to return the money "or its proceeds." Would this cover fraudulent retention of premium payments and failure to pay out policy benefits?

the "relationship" between the punitive award and the statutory fine has become so attenuated that the award is unconstitutional? What is the maximum award if there is no criminal analog? Are juries to be instructed concerning all possible criminal analogues, and allowed to choose among them, or will they exercise a meaningless "discretion," not knowing that their assessment of the appropriate damages is likely to be irrelevant? [61] If the maximum criminal fine is obviously insufficient to serve as a meaningful deterrent (as here), is the jury (or court) then free to assess a larger sum? [62] In assessing punitive damages, could the jury add to the amount of the criminal fine the monetary value of whatever *imprisonment* is authorized by the criminal statute? If so, what is the monetary value of one year, or ten years, in jail? [63] Could the jury add to the amount of the criminal fine the monetary value of the *stigma* of criminal conviction, or the value of the loss of voting rights, the revocation of a business license,[64] and other rights such convic-

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[61] At trial, Appellant proposed no instruction and offered no evidence concerning the maximum fine authorized by any Mississippi criminal statute.

[62] *Brooks v. Wooton*, 355 F.2d 177 (2d Cir. 1966), upheld a punitive damage award of $6,500 against a motorist who caused an accident while intoxicated. The maximum criminal fine for that conduct was $25. *See* Comment, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. CHI. L. REV. 408, 411 (1967). Under Appellant's theory, that award violated the Eighth Amendment.

[63] Individuals usually lose their ordinary sources of income while imprisoned. Computation of a comparable penalty for a corporation, which cannot be imprisoned, would require courts to take into account the income the corporation would lose if it were forced to cease business for a year, or ten years. Appellant's annual income is approximately $150 million per year. R. 762.

[64] Appellant contends that it should not have to pay punitive damages greater than the $1,000 criminal fine authorized for violation of Miss. Code Ann. Sec. 85-5-35. App. Br. 33. But in addition to the criminal fine, violation of 85-5-35 can also result in revocation of "the license of such person to transact the business of insurance" in Mississippi. *See* 83-5-49; 83-5-41; 83-5-39.

tion entails?[65] Would it violate the Eighth Amendment if states authorized criminal fines for analogous conduct of one percent of a corporate defendant's net worth, and juries then assessed punitive damages at that rate? Would the criminal fine fix the maximum for punitive damage awards if a state had made it clear that it did not want to limit the discretion of juries to impose higher punitive damage awards for comparable conduct?[66] In that case, how large an award would the Eighth Amendment permit?

As these questions indicate, evaluating the constitutionality of civil sanctions by reference to criminal sanctions is doomed to failure because the civil justice system and the criminal justice system are designed to *complement* each other, not to *copy* each other. *Sedima v. Imrex*, 473 US 479, 492-93 (1985). Both systems play important, but different, roles in regulating undesirable social behavior. Fine-tuning the complex inter-relationships between these two systems is quintessentially a matter for legislative judgment.

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[65] "The money judgment assessed against the punitive damages defendant hardly seems comparable in effect to the criminal sanctions of death, imprisonment, and stigmatization." Comment, *supra* note 62, at 408, 411. And even the criminal "fine, unlike punitive damages, still carries the full weight of stigma associated with criminal conviction." *Id.*

[66] State legislatures have the power to cap punitive damage awards if they choose to do so. They are obviously aware that such awards frequently exceed the maximum criminal fine for comparable conduct. Accordingly, their inaction reflects a policy choice to allow large punitive damage awards as a supplement to the criminal law. In 1986, the Mississippi legislature defeated H.B. 307, which would have capped punitive damages at $150,000.

IV. APPELLANT'S CONTRACT CLAUSE AND DUE PROCESS OBJECTIONS TO THE AWARD OF ANY PUNITIVE DAMAGES IN THIS CASE SHOULD BE REJECTED.

In addition to challenging the size of the punitive damage award, Appellant also challenges *any* punitive damages in this case on Contract Clause and "retrospective" Due Process grounds.

A. The Contract Clause Issue Is Not Properly Before The Court, And Has No Merit.

Appellant concedes that its Contract Clause argument —that the decision of the Mississippi Supreme Court changed the obligations of its insurance contract with Appellee—was not raised below, even in its Petition For Rehearing. J.S. 18 n.7. Thus, that issue is not before the Court. *See* note 30, *supra*. In any event, the argument is so frivolous that Appellant has not been able to cite a single authority to support it.

First, "[i]t has been settled by a long line of decisions" that the Contract Clause "is directed only against impairment by legislation, and not by judgments of courts. The language—'No state shall . . . *pass any* . . . *law* impairing the obligation of contracts'—plainly requires such a conclusion." *Tidal Oil Co. v. Flanagan*, 263 US 444, 451 (1923) (footnote omitted; emphasis in original).

Second, the Mississippi Supreme Court's decision did not even arguably impair or change the terms of Appellant's *contractual* obligations to Appellee. (Indeed, Appellant did not even challenge the award of contract damages on appeal.) The change of law claimed by Appellant was, at most, a change in its *tort law* obligations to Appellee. And that decision did not even change Appellant's tort law obligations, as Appellee will now show.

B. The "Change of Law" Due Process Clause Issue Is Not Properly Before The Court, And Has No Merit.

Appellant argues that in this case *any* punitive damage award, in any amount, violates the Due Process Clause because it is allegedly based on "a newly announced standard of liability imposed retrospectively to this case." App. Br. 40. This argument was raised for the first time in Appellant's Petition For Rehearing, J.S. 18 n.7. The Mississippi Supreme Court denied the petition. Ordinarily, questions raised for the first time in a petition for rehearing will not be considered by this Court.[67] In *Hathorn v. Lovorn*, 457 US 255 (1982), the Court announced a narrow exception to that general rule in a case involving a non-constitutional issue. This case does not come within that narrow exception, and Appellant has suggested no reason why that exception should be broadened to justify review here of a *constitutional* question raised below only in a petition for rehearing. *Hathorn* involved "apparently conflicting state and federal statutes," 457 US at 260, and there are strong policy reasons why this Court should resolve that type of conflict. But this case involves a *constitutional* question, and there are strong policy reasons why the Court should *not* resolve constitutional questions unless it is absolutely necessary to do so.[68]

Moreover, in *Hathorn* it was unclear (and the Court did not decide) whether the Mississippi Supreme Court had actually *decided* the federal statutory issue on direct

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[67] *Radio Station WOW, Inc. v. Johnson*, 326 US 120, 128 (1945); *Hanson v. Denckla*, 357 US 235, 243-44 (1958); *Herndon v. Georgia*, 295 US 441, 443 (1935); *American Surety Co. v. Baldwin*, 287 US 156 (1932); *Forbes v. State Council*, 216 US 396 (1910).

[68] *E.g. Superintendent v. Hill*, 472 US 445, 453 (1985) (Court is required "to avoid unnecessary resolution of constitutional issues"); *Illinois v. Gates*, 459 US 1028, 1031 (1982) (Stevens, J., dissenting); *Ashwander v. Tennessee Valley Authority*, 297 US 288, 346-48 (1936) (Brandeis, J., concurring).

appeal, before the petition for rehearing, or had avoided deciding the question, both on appeal and also when it was raised in the petition for rehearing. 457 US at 264 & 265 n.15; *see also id.* at 260-61. In this case, however, it is indisputable that the court below did *not* decide the due process issue on direct appeal. In these circumstances, *Hathorn* may permit, but it does not require, the Court to resolve a federal constitutional question that was raised for the first time in a petition for rehearing.

Furthermore, Appellant's contention that it was "punished" without fair notice is remarkable because the punitive damages were awarded under instructions proposed or accepted by Appellant.[69] Appellant argues that the Mississippi Supreme Court changed the law in two respects: first, by allegedly ruling that punitive damages are available "regardless of wrongful motive, if the insurer *lacked* a legally sufficient 'arguable basis' for rejecting a claim," App. Br. 40; and second, by allegedly ruling that an insurer not only must have an arguable basis for denying a claim, but "must assert that precise basis in denying a claim in order to rely on that basis as a defense against a claim for punitive damages." App. Br. 40-41.

The jury instructions proposed by Appellant, and given by the Court, required the jury to find a wrongful motive, instructed the jury that it could not award punitive damages if Appellant had an arguable reason for refusing to pay the claim, and absolved Appellant of liability if Appellant *had* such an arguable reason, even if it had not asserted that reason when denying the claim. *See* note 69, *supra.* Substantial evidence was presented at trial showing that Appellant did *not* have an arguable reason for refusing to pay the claim (and instead de-

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[69] R. 1138, J.A. 20. *See also* R. 1141, J.A. 21. And see the first and second paragraphs of Jury Instruction P-19A, R. 1130, J.A. 19, proposed by Appellee and not objected to by Appellant. R. 1065-1066.

nied the claim because of its mistaken belief that Mississippi was only a "penalty" state). The jury was properly instructed on that issue, and found in favor of Appellee. Accordingly, it was not necessary to "change the law" in order to affirm the award; even if the Mississippi Supreme Court did change the law (and it did not), that change had no effect on Appellant.

As Appellant concedes, it has long been established in Mississippi that punitive damages are available when a breach of contract is "attended by some intentional wrong, insult, abuse, or gross negligence." App. Br. 40.[70] The court below did not change that law in any respect. It specifically reaffirmed the rule that punitive damages can be awarded only for "a willful and intentional wrong, or for such gross negligence and reckless negligence as is equivalent to such a wrong." J.S. App. 29a; 483 So.2d 269.[71] And it did not require insurers to *assert* an "arguable reason" when denying claims in order to rely on that reason at trial. It simply required insurers to *refrain* from asserting reasons they *knew to be illegal* when denying claims. That requirement is consistent with Mississippi's long-standing rule that when a breach of contract is attended by such an "intentional wrong," the jury is permitted to award punitive damages.

CONCLUSION

The Court should affirm the judgment below imposed under the authority of Miss. Code Ann. § 11-3-23. The Court should dismiss the writ of certiorari concerning Appellant's challenges to the punitive damage award as

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[70] That has been the rule in Mississippi since 1915. *See Pilot Life Insurance Co. v. Dedeaux*, 481 US ——, 95 L.Ed.2d 39, 49 (1987).

[71] Recently, the Mississippi Supreme Court has cited its opinion in this case as reaffirming that rule. *South Central Bell v. Epps*, Civ. No. 55870, slip op. at 12 (Miss. Sup. Ct., June 3, 1987).

improvidently granted; in the alternative, the Court should rule that the punitive damage award did not violate the Eighth Amendment, the Due Process Clause, or the Contracts Clause.

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August 5, 1987

APPENDIX

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STATUTORY PROVISION INVOLVED

Section 11-3-23 of the Mississippi Code Annotated (Supp. 1986) provides that:

> "In case the judgment or decree of the court below be affirmed, or the appellant fails to prosecute his appeal to effect, the supreme court shall render judgment against the appellant for damages, at the rate of fifteen percent (15%), as follows: If the judgment or decree affirmed be for a sum of money, the damages shall be upon such sum. If the judgment or decree be for the possession of real or personal property, the damages shall be assessed on the value on the property. If the judgment or decree be for the dissolution of an injunction or other restraining process at law or in chancery, the damages shall be computed on the amount due the appellee which was enjoined or restrained. If the judgment or decree be for the dissolution of an injunction or other restraining process as to certain property, real or personal, or a certain interest in property, or be a judgment or decree for the sale of property, or some interest in it, to satisfy a sum out of the proceeds of sale, or to enforce or establish a lien or charge or claim upon or some interest in property, and the only matter complained of on the appeal is the decree as to some particular property or claim on it, the damages shall be computed on the value of the property or the interest in it, if the value of the property or interest in it be less than the judgment or decree against it; but if the value of the property or interest in it be greater than the amount of the judgment or decree against it, the damages shall be upon the amount of the judgment or decree; provided, however, the above penalty shall not be assessed against any condemnee appealing from a special court of eminent domain in any circumstances."